LIEW JU MIN v. CHOO WEE POH & ANOR

HIGH COURT MALAYA, PULAU PINANG
LIM CHONG FONG JC
[ORIGINATING SUMMONS NO: 24NCVC-807-09-2015]
2 SEPTEMBER 2016

CIVIL PROCEDURE: *Striking out – Originating summons ('OS') – Non compos mentis – Mental Health Act 2001 – Appointment committee of person and estate of person – Application to strike out OS – Grounds to strike out – Whether leave of court obtained pursuant to O. 76 Rules of Court 2012 ('ROC') prior to filing of OS – Whether defendants wrongly named in OS – Whether OS prematurely filed without prior inquiry under s. 53(1) of Mental Health Act 2001 – Whether persons under disability and mentally disordered parties to OS – Whether OS ought to be struck out*

The plaintiff sued the defendants *vide* a civil suit ('civil suit') for unlawfully interfering with the rights of the plaintiff as the relative (within the meaning of the Mental Health Act 2001) of her parents, Liew Kee Hooi and Choo Wee Thim and for negligence in connection thereto. In the civil suit, the plaintiff also sued Pulau Pinang Clinic Sdn Bhd (the owner of the Penang Gleneagles Hospital) ('PPCSB') for negligence by reason of various failures and omissions on the part of PPCSB in relation to the care and management of both parents of the plaintiff. The civil suit was filed concurrently with an originating summons ('OS'). The principal object of the OS was to get the court to appoint a committee of Choo Wee Thim and the committee of the estate of Choo Wee Thim as well as a committee of Liew Kee Hooi and the committee of the estate of Liew Kee Hooi pursuant to the Mental Health Act 2001 ('MHA') by reason that they were allegedly *non compos mentis*. The defendants filed the present application to strike out the OS on the grounds, *inter alia*, that (i) no leave of court had been obtained pursuant to O. 76 of the Rules of Court 2012 ('ROC') prior to the filing of the OS; (ii) the defendants were wrongly named in the OS; (iii) the OS to appoint a committee of the person and the estate of the person had been prematurely filed without any prior inquiry to determine whether Choo Wee Thim and Liew Kee Hooi as persons subject to the jurisdiction of the court and alleged to be mentally disordered were incapable of managing themselves and their respective affairs due to such mental disorder under s. 53(1) of the MHA; and (iv) the persons under disability and alleged to be mentally disordered, *to wit*, Choo Wee Thim and Liew Kee Hooi, were not parties to the OS.

Held:

(1) Leave is required to be obtained from the High Court if and only if a suit or proceeding is brought against a mentally disordered or disabled person as so found or declared by the court. It is unnecessary to do so in an application to have a person found or to be declared mentally

A disordered or disabled by the High Court. In the premises, it could not be said that the OS was obviously unsustainable because of the absence of leave. (para 24)

(2) It was not wrong for the plaintiff to have named the defendants in the OS since the dominant purpose was to establish the committees to care and manage Choo Wee Thim and Liew Kee Hooi pursuant to the MHA. (para 25)

(3) The plaintiff had not forgotten the requirement to hold an inquiry because reference to s. 52(3) of the MHA was stated in the intitulement to the OS. The plaintiff wanted to file an interlocutory application to hold an inquiry prior to the disposal of the OS. Since the trial of the civil suit and hearing of the OS were taken together, the aforesaid inquiry would be undertaken as part of the trial since all the doctors who treated Choo Wee Thim and Liew Kee Hooi were likely to be witnesses at the trial. As provided in s. 54(1) of the MHA, the Choo Wee Thim and Liew Kee Hooi could be brought before the court (alternatively the judge may visit them at the hospital) to be personally examined whether their alleged mental disorder is established. As the result, the alleged non holding of an inquiry was *non sequitur*. (para 27)

(4) The OS could be saved by way of an amendment to add both Choo Wee Thim and Liew Kee Hooi as the third and fourth defendants in the OS respectively. The plaintiff had no objection to the amendment. The court should not be besotted by the rules of technicality and allow justice to be forsaken by the alleged procedural irregularities in civil litigation. Choo Wee Thim and Liew Kee Hooi whose physical and mental health were fast deteriorating by the days. The paramount objective was to dispose both the civil suit and OS as expeditiously. (para 31)

(5) The OS was ordered to be amended *in lieu* of being struck out by way of adding Liew Kee Hooi and Choo Wee Thim as the third and fourth defendants in the OS respectively. The defendants were ordered to file a further affidavit to offer themselves or others to be appointed to the committee and committee of estate of Liew Kee Hooi and Choo Wee Thim. The intitulement in the OS be consequently amended by adding reference to ss. 52, 53, 64, 56 and 57 of the Mental Health Act 2001, s. 24(e) of the Courts of Judicature Act and O. 76 rr. 1A, 3 of the Rules of Court 2012. Leave of court pursuant to O. 76 r. 1A of the ROC was deemed given. (para 11)

Case(s) referred to:

AIC DotCom Sdn Bhd v. MTEX Corporation Sdn Bhd & 2 Ors [2009] 1 LNS 118 CA ***(refd)***

Aminah Ahmad v. Ali Mokthar Hj Abdul Rahman [2015] 2 CLJ 940 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

JJ Raj v. Dato' Edward Lawrence & Ors [2015] 7 CLJ 238 HC ***(refd)***

Soon Poy Yong v. Westport Properties Sdn Bhd & Ors [2014] 10 CLJ 686 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 24(e)
Mental Health Act 2001, ss. 51, 52(3), 53(1), 54(1), 56, 57
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 76 rr. 1, 1A, 3, 6

For the plaintiff - Celine Chelladurai, Karlos Israphil Bendlin & Tan Boon Han; M/s Zaid Ibrahim & Co
For the defendants - Yeoh Jin Aik & M Thayalan; M/s Thayalan & Assocs

Reported by Sandra Gabriel

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an application (encl. 21) brought by the defendants to strike out the originating summons filed by the plaintiff dated 14 September 2015 ('OS') pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012.

[2] The plaintiff is the legally adopted daughter of Liew Kee Hooi and Choo Wee Thim.

[3] The first defendant is the brother of Choo Wee Thim who is married to Liew Kee Hooi. The second defendant is the wife of the first defendant.

Salient Background Facts

[4] By a Civil Suit No: 22 NCVC-144-09-2015 dated 14 September 2015 also filed in the Penang High Court ('civil suit') concurrently with the OS, the plaintiff sued the defendants for unlawfully interfering with the rights of the plaintiff as the relative (within the meaning of the Mental Health Act 2001) of her parents and for negligence in connection thereto. In that civil suit, the plaintiff also sued Pulau Pinang Clinic Sdn Bhd (the owner of the Penang Gleneagles Hospital) ('PPCSB') for negligence by reason of various failures and omissions on the part of PPCSB in relation to the care and management of both parents of the plaintiff who were and are still warded in the Penang Gleneagles Hospital.

[5] The principal object of the OS is to get the court to appoint a committee of Choo Wee Thim and the committee of the estate of Choo Wee Thim as well as a committee of Liew Kee Hooi and the committee of the estate of Liew Kee Hooi pursuant to the Mental Health Act 2001 ('MHA') by reason that they were allegedly *non compos mentis*.

[6] The civil suit and the OS first came before me for case management on 27 January 2016. In view of the complexity of the case and inter-connectedness of both the civil suit and OS, I directed that they be decided together after the conclusion of the trial of the civil suit. Furthermore, by

reason of the advanced age of both the plaintiff's parents, I fixed the civil suit for early trial on 25 and 26 April 2016. It was clear to me and the parties that the evidence to be led in the civil suit which included the testimony of the doctors who treated the plaintiff's parents would be necessary for me to conclusively determine whether the plaintiff's parents are *non compos mentis*. There was no doubt from a lay point of view that her parents are likely *non compos mentis* because Choo Wee Thim is believed to be suffering from Alzheimer's disease and Liew Kee Hooi suffered several hemorrhagic strokes in 2015. In that sense, the aforesaid mental capacity of Choo Wee Thim and Liew Kee Hooi as it then prevailed was not disputed by the parties.

[7] The trial of the civil suit commenced on 25 and 26 April 2016 as scheduled and was thereafter postponed to 10, 11, 12, 15 and 16 August 2016 for continued hearing because of the extensive number of witnesses called by the parties, particularly the doctors who have treated Choo Wee Thim and Liew Kee Hooi.

[8] The defendants then on 18 April 2016 decided to file this application to strike out the OS notwithstanding that I have earlier ruled and directed that the OS would be determined together with the civil suit after conclusion of the trial of the civil suit.

Striking Out Application

[9] The cause papers relating to this application comprised of the following:

(i) defendants' notice of application dated 18 April 2016;

(ii) defendants' affidavit in support affirmed by Koay Siew Huar on 15 April 2016;

(iii) plaintiff's notice of intention to use affidavit dated 2 May 2016; and

(iv) plaintiff's affidavit in reply affirmed by Liw Ju Min on 5 May 2016.

[10] The defendants were unwilling to have this striking out application determined later together with the OS despite my request to do so as I did in *Soon Poy Yong v. Westport Properties Sdn Bhd & Ors* [2014] 10 CLJ 686 with the consent of the parties.

[11] Consequently, I heard the parties on 15 July 2016 and on my own volition ordered the OS be amended *in lieu* of being struck out by way of adding Liew Kee Hooi and Choo Wee Thim as third and fourth defendants in the OS respectively. In addition, I gave liberty to the defendants to file a further affidavit to offer themselves or others to be appointed to the committee and committee of estate of Liew Kee Hooi and Choo Wee Thim. I also ordered that the intitulement in the OS be consequently amended by adding reference to ss. 52, 53, 54, 56 and 57 of the Mental Health Act 2001,

s. 24(e) of the Courts of Judicature Act and O. 76 rr. 1A, 3 of the Rules of Court 2012. I also ruled that leave of court pursuant to O. 76 r. 1A of the Rules of Court 2012 is deemed given by the above orders.

[12] The defendants were dissatisfied with my decision and have on 12 August 2016 filed a notice of appeal to the Court of Appeal.

[13] In the premises, I furnish hereinbelow the grounds of my decision.

Contentions Of The Parties

[14] The defendants' application is premised upon four grounds, *to wit*:

(i) there was no leave obtained from the court pursuant to O. 76 r. 1A of the Rules of Court 2012 prior to the filing of the OS by the plaintiff;

(ii) both the defendants that were named in the OS are neither disabled persons within the meaning of O. 76 r. 1 of the Rules of Court 2012 nor mentally disordered within the meaning of s. 51 of the MHA;

(iii) the persons under disability and alleged to be mentally disordered, *to wit*: Choo Wee Thim and Liew Kee Hooi are not parties to the OS; and

(iv) the OS to appoint a committee of the person and the estate of the person has been prematurely filed without any prior inquiry to determine whether Choo Wee Thim and Liew Kee Hooi as persons subject to the jurisdiction of the court and alleged to be mentally disordered are incapable of managing themselves and their respective affairs due to such mental disorder under s. 53(1) of the MHA.

[15] Apposite to the defendants' contentions, the plaintiff replied as follows:

(i) the defendants' reference to O. 76 r. 1A on the requirement of prior leave to be obtained from court before the filing of the OS is wrong and misconceived. This is because it is clear that is subject to whether a person is mentally disordered and only becomes applicable where an action is to be filed or filed against that mentally disordered person. In the OS, neither Choo Wee Thim nor Liew Kee Hooi has yet to be declared as a mentally disabled person;

(ii) the defendants were named because they are the parties who claimed that they want to have care and custody of Choo Wee Thim and Liew Kee Hooi. They also objected to the discharge of Choo Wee Thim and Liew Kee Hooi from Penang Gleneagles Hospital that resulted in the bringing of the civil suit;

(iii) the cause of action in the OS is that both Choo Wee Thim and Liew Kee Hooi are incapacitated and can no longer care for themselves and make decisions pertaining to their care, affairs and estate. The plaintiff filed the OS as the sole legally adopted child of both of them (hence their

A nearest relative and/or next of kin) to have a committee appointed for the person and estate of the person in order to manage their care, affairs and estate pursuant to the MHA;

(iv) it is not a requirement of the MHA that an inquiry must be made together with or prayed in the OS. The OS was in fact filed on an urgent B basis following the legal position taken by the Penang Gleneagles Hospital that compelled the plaintiff to commence legal proceedings, hence the bringing of the civil suit simultaneously with the OS. The plaintiff was unable to then file an application for an inquiry in the absence of the medical reports of the doctors who treated Choo Wee C Thim and Liew Kee Hooi. The plaintiff made clear that she intended to do so by way of an interlocutory application before the disposal of the OS.

Findings Of The Court

D **[16]** Since this is a striking out application filed by the defendants pursuant to O. 18 r. 19 of the Rules of Court 2012, it is appropriate that I reproduce the provision with emphasis added:

19. Striking out pleadings and endorsements (O. 18 r. 19)

(1) The Court may at any stage of the proceedings order to be struck E out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

F (b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

G and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

H (3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[17] The leading and oft quoted case authority in respect of this provision is *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 wherein Mohamed Dzaiddin SCJ (later I CJ) held as follows at p. 11 (CLJ); p. 42 (MLJ):

The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. **It is only in plain and obvious cases that recourse should be had to the summary process under this rule** (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7), *and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable*' (see *AG of Duchy of Lancaster v. L & NW Rly Co* 8). *It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence* (see *Wenlock v. Moloney & Ors* 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (emphasis added)

[18] The OS here principally involves the appointment of the committee for Choo Wee Thim and Liew Kee Hooi and committee of the estate of Choo Wee Thim and Liew Kee Hooi pursuant to the MHA. There is dearth of local case authority that manoeuvred the provisions of the MHA together with O. 76 of the Rules of Court 2012.

[19] The relevant provisions of the MHA are as follows:

51. Interpretation

In this Part:

"Court" means the High Court;

"mentally disordered person" means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs.

52. Court may order inquiry

(1) The Court may, on an application made before it, make an order directing an inquiry to determine whether a person subject to the jurisdiction of the Court and alleged to be mentally disordered is incapable of managing himself and his affairs due to such mental disorder.

(2) The order of the Court under subsection (1) may also contain directions for inquiries to be made concerning:

(a) the nature of the property belonging to the person alleged to be mentally disordered;

(b) the persons who are his relatives;

(c) the period during which he has been mentally disordered; or

(d) such other questions as the Court deems proper.

A (3) The application for such an inquiry may be made by a relative of the person alleged to be mentally disordered, or by any public officer nominated by the Minister for the purpose of making the application.

53. Notice of inquiry

B (1) The Court shall give reasonable notice to the person alleged to be mentally disordered and the applicant of the time and place fixed for the inquiry.

(2) Where it appears to the Court that the person alleged to be mentally disordered is in such a state that personal service on him of the notice would be ineffectual, the Court may, for the purpose of bringing the C person to the inquiry, direct that the service of the notice be made on the person having charge of him or on any adult person or the owner or occupier of the premises wherein the mentally disordered person lives.

54. Power to examine person alleged to be mentally disordered

D (1) At any time after the application for the inquiry is made, the Court may:

(a) require the applicant to produce the person alleged to be mentally disordered at such time and place as the Court may appoint, for the purpose of being personally examined by the Court or by a psychiatrist from whom the Court may desire to have a report of his E mental capacity and condition; and

(b) make an order authorising any person or persons named in the order to have access to the person alleged to be mentally disordered for the purpose of a personal examination and making the report referred to in paragraph (a).

F (2) The psychiatrist making a report under paragraph (1)(a) in respect of the person alleged to be mentally disordered shall consider:

(a) the nature and degree of the person's condition;

(b) the complexity of his estate;

G (c) the effect of the condition of the person upon his conduct in administering his estate; and

(d) any other circumstances the psychiatrist considers relevant to the estate and the person and his condition.

(3) The report referred to in paragraph (1)(a) shall be admissible in H evidence at the inquiry to be held by the Court under this Part.

58. Appointment of committees

(1) If the Court finds that the person who is alleged to be mentally disordered is incapable of managing himself and his affairs due to his mental disorder, the Court may appoint a committee or committees of the I person and of the estate of the person and may, as the Court deems fit, make an order:

(a) as to the remuneration, if any, of the committee or committees out of the person's estate; or

(b) as to the giving of security by the committee or committees.

(2) Where the Court finds that the person alleged to be mentally disordered is incapable of managing his affairs due to his mental disorder but is not dangerous to himself or to others, the Court may appoint a committee of his estate without appointing a committee of his person.

[20] As to the Rules of Court 2012, the relevant provisions are as follows:

1. Interpretation (O. 76 r. 1)

In this Order:

"the Act" means the Mental Health Act 2001 [Act 615];

"person under disability" means a person who is a minor or a patient;

"patient" means a mentally disturbed person within the meaning of the Act.

1A. Application for leave to institute proceedings (O. 76 r. 1A)

(1) The jurisdiction of the High Court to grant leave pursuant to the Mental Health Act 2001 to bring proceedings against a person may be exercised only by a High Court Judge.

(2) The application shall be supported by an affidavit setting out the grounds on which such leave is sought and any facts necessary to substantiate those grounds.

2. Person under disability shall sue by litigation representative (O. 76 r. 2)

(1) A person under disability may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative.

(2) Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his litigation representative.

(3) A litigation representative of a person under disability shall act by a solicitor.

3. Appointment of litigation representative (O. 76 r. 3)

(1) This rule shall not apply in relation to a probate action.

(2) Except as provided by paragraph (4) or (5) or by rule 6, an order appointing a litigation representative of a person under disability is not necessary.

A (3) Where a person is authorised under the Act to conduct legal proceedings in the name of a patient or on his behalf, that person shall be entitled to be litigation representative of the patient in any proceedings to which his authority extends unless, in a case to which paragraph (4) or (5) or rule 6 applies, some other person is appointed by the Court under that paragraph or rule to be litigation representative of the patient in those B proceedings.

(4) Where a person has been or is a litigation representative of a person under disability in any proceedings, no other person shall be entitled to act as such litigation representative of the person under disability in those proceedings unless the Court makes an order appointing him such C litigation representative in substitution for the person previously acting in that capacity.

(5) Where, after any proceedings have been begun, a party to the proceedings becomes a patient, an application shall be made to the Court for the appointment of a person to be litigation representative of that D party.

(6) Except where the litigation representative of a person under disability has been appointed by the Court-

(a) the name of any person shall not be used in a cause or matter as litigation representative of a person under disability;

E (b) an appearance shall not be entered in a cause or matter for a person under disability; and

(c) a person under disability shall not be entitled to appear by his litigation representative on the hearing of an originating summons which has been served on him, unless and until the documents F listed in paragraph (7) have been filed in the Registry.

(7) The documents referred to in paragraph (6) are the following:

(a) a written consent in Form 188 to be litigation representative, of the person under disability in the cause or matter in question given by the person proposing to be such litigation representative;

G (b) where a person proposing to be such litigation representative of the person under disability, being a patient, is authorised under the Act to conduct the proceedings in the cause or matter in question in the name of the patient or on his behalf, an office copy, sealed with the seal of the Court, of the order or other authorisation made or given H under the Act by virtue of which he is so authorised; and

(c) except where the person proposing to be such litigation representative of the person under disability, being the patient, is authorised as mentioned in subparagraph (b), a certificate in Form 189 made by the solicitor for the person under disability certifying:

I (i) that he knows or believes, as the case may be, that the person to whom the certificate relates is a minor or a patient, giving (in the case of a patient) the grounds of his knowledge or belief; and

(ii) where the person under disability is a patient, that there is no person authorised as aforesaid; and

(iii) that the person so named has no interest in the cause or matter in question adverse to that of the person under disability.

6. Appointment of litigation representative where person under disability does not appear (O. 76 r. 6)

(1) Where:

(a) in an action against a person under disability begun by originating summons, no appearance is entered for that person; or

(b) the defendant to an action serves a defence and counterclaim on a person under disability who is not already a party to the action and no appearance is entered for that person,

an application for the appointment by the Court of litigation representative of that person shall be made by the plaintiff or defendant, as the case may be, after the time limited, as respects that person, for appearing and before proceeding further with the action or counterclaim.

(2) Where a party to an action has served on a person under disability who is not already a party to the action a third party notice within the meaning of Order 16 and no appearance is entered for that person to that notice, an application for the appointment by the Court of a litigation representative of that person shall be made by that party after the time limited (in respect of that person) for appearing and before proceeding further with the third party proceedings.

(3) Where in any proceedings against a person under disability that person does not appear by a litigation representative at the hearing of the originating summons, the Court hearing it may appoint a litigation representative of that person in the proceedings or direct that an application be made by the applicant, for the appointment of such a litigation representative.

(4) At any stage in the proceedings under any judgment or order, notice of which has been served on a person under disability, the Court may, if no appearance is entered for that person in the originating summons, appoint a litigation representative of that person in the proceedings or direct that an application be made for the appointment of such litigation representative.

(5) An application under paragraph (1) or (2) shall be supported by evidence proving:

(a) that the person to whom the application relates is a person under disability;

(b) that the person proposed as litigation representative is willing and a proper person to act as such and has no interest in the proceedings adverse to that of the person under disability;

A (c) that the originating summons, defence and counterclaim or third party notice, as the case may be, was duly served on the person under disability; and

(d) subject to paragraph (6), that notice of the application was, after the expiration of the time limited for appearing and at least seven days before the day fixed for hearing, so served on him.

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(6) If the Court so directs, notice of an application under paragraph (1) or (2) need not be served on a person under disability.

(7) An application for the appointment of a litigation representative made in compliance with a direction of the Court given under paragraph (3) or C (4) shall be supported by evidence proving the matters referred to in subparagraph (5)(b).

[21] I firstly dealt with the defendants' contention that no leave of court had been obtained pursuant to O. 76 of the Rules of Court 2012 prior to the filing of the OS. The plaintiff relied on the case of *JJ Raj v. Dato' Edward* D *Lawrence & Ors* [2015] 7 CLJ 238. In that case, it concerned the plaintiff commencing legal proceedings for negligence, breach of fiduciary duty and breach of trust against one of the defendants who has been declared by another high court to be a mentally disordered person under the MHA. Leave to sue that defendant has not been prior obtained from the court. As E the result, the plaintiff's action against that defendant was dismissed for want of leave.

[22] It is plain that the OS here is plainly distinguishable from the aforementioned case. This case before me pertains to the appointment of committees for the care and management of persons allegedly under mental F disorder. They were not sued for wrongful actions committed or omissions by them.

[23] It is not clear in O. 76 r. 1A of the Rules of Court 2012 if leave is intended for this situation. In the Malaysian Civil Procedure 2015 Volume 1, the commentators said as follows at paras. 76/1A/1&2:

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There is no corresponding provision under RSC 1965 (Eng). This is a new provision previously not found under RHC 1980 or the SCR 1980.

The rule taken together with the headnote, seems to suggest that leave of court must be sought before proceedings are commenced against a person who are suffering from mental disability. It directs leave to H commence proceedings to be obtained from a High Court judge pursuant to the Mental Health Act 2001. However it is noteworthy that there is no provision under the Act, which deals with leave application to commence proceeding against a person suffering from mental disability.

[24] It is my view that leave is required to be obtained from the High Court I if and only if a suit or proceeding is brought against a mentally disordered or disabled person as so found or declared by the court as illustrated in the case of *JJ Raj v. Dato' Edward Lawrence & Ors (supra)*. It is unnecessary to do

so in an application to have a person found or to be declared mentally disordered or disabled by the High Court. In the premises, it cannot be said the OS is obviously unsustainable because of the absence of leave.

[25] Secondly as to the defendants' contention that they were wrongly named in the OS, I accepted the plaintiff's explanation that it was because the defendants are the parties who have been objecting to the discharge of both Choo Wee Thim and Liew Kee Hooi from the Penang Gleneagles Hospital and claiming that they want to have care and custody of both of them. This is evident in the civil suit. On that premise, it is in my view not wrong for the plaintiff to have named them as defendants in the OS since the dominant purpose is to establish the committees to care and manage Choo Wee Thim and Liew Kee Hooi pursuant to the MHA.

[26] Thirdly as to the necessity of having an inquiry to determine whether Choo Wee Thim and Liew Kee Hooi are mentally disordered or disabled, the parties appeared to be in concurrence. The requirement of holding an inquiry has been made clear in *Aminah Ahmad v. Ali Mokthar Hj Abdul Rahman* [2015] 2 CLJ 940 where Nordin Hassan JC held as follows at pp. 944-945:

> [16] In the context of present case, the procedures laid down in Part X which includes ss. 51 to 58 of the Act is the due course of law to be complied with before a person can be found to be a mentally disordered person. The court has to make a finding that the person to be mentally disordered and incapable of managing himself and affairs before the court can exercise its discretion under s. 58 to appoint a committee or committees, for the person and his estate.
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> [17] In the case of *Pasaraya Seri Sayang Sdn Bhd v. Majlis Pulau Pinang* [1988] 2 CLJ 99; [1988] 2 CLJ (Rep) 107; [1988] 3 MLJ 51 at p. 54, the words 'due course of law' succinctly explained as follows:
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> What this expression 'indue course of law ' means is explained in *Pollock and Mulla (supra)* at p. 816:
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> The words 'due course of law' are not merely equivalent to the word 'legally' for thing which is perfect by legal may still by no means a thing done 'in due course of law'. The expression 'due course of law' means the regular, normal process and the effect of the law operating on the matter which has been laid before it for adjudication ...
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> [18] Here the process and the effect of the law which has been laid to determine a mentally disordered person and thereafter for the appointment of committee or committees as mentioned earlier are clearly provided in Part X ss. 51 to 58 of the Mental Health Act 2001.
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> [19] Turning to the present case, the applicant has not made any application under s. 52(3) for this court to order an inquiry under s. 52(1) and thereafter to make a finding whether the respondent is incapable of managing himself and his affairs due to his mental disorder as provided under s. 56 of the Act.

A [20] As such, there is no finding by due course of law that respondent is a mentally disordered person and incapable of managing himself and his affair. Therefore this court is unable to appoint any committee or committees for the respondent and his estate.

[27] The plaintiff has not forgotten the requirement to hold an inquiry B because reference to s. 52(3) of the MHA was stated in the intitulement to the OS. She wanted to file an interlocutory application to hold an inquiry prior to the disposal of the OS. Since the trial of the civil suit and hearing of the OS are taken together, I made it clear to the parties during pre-trial case management that the aforesaid inquiry would be undertaken as part of C the trial since all the doctors who treated Choo Wee Thim and Liew Kee Hooi are likely to be witnesses at the trial. As provided in s. 54(1) of the MHA, I am empowered to have the Choo Wee Thim and Liew Kee Hooi brought to me (alternatively I may visit them at the Penang Gleneagles Hospital) to be personally examined whether their alleged mental disorder is established. I intend to do so after hearing the testimony of the doctors. D As the result, the alleged non holding of an inquiry is *non sequitur*.

[28] Fourthly and finally, the defendants contended that Choo Wee Thim and Liew Kee Hooi ought to have been made parties to the OS. I thought so too as seen in *Aminah Ahmad v. Ali Mokthar Hj Abdul Rahman (supra)*. The E defendants did not furnish a good reason as to why they had not been as well as ought not to be made as parties.

[29] Ordinarily, this would justify the striking out of the OS but I do not think that the omission *per se* is an incurable fatality. In the Court of Appeal case of *AIC DotCom Sdn Bhd v. MTEX Corporation Sdn Bhd & 2 Ors* [2009] F 1 LNS 118; [2011] 3 MLJ 476, Gopal Sri Ram JCA (later FCJ) held as follows at pp. 479-480:

> *[6] It is now well settled that a court which is moved to strike out a pleading has a separate and independent jurisdiction to direct an amendment to save the pleading in lieu of it being struck out* (see *Shahidan Shafie v. Atlan Holdings Bhd & Anor* G *& Other Appeals* [2005] MLJU 279; [2005] 3 CLJ 793). *But the power may only be exercised if the pleading is capable of being saved by an amendment.* On the facts that form common ground between the litigants before us, no amendment can possibly save the appellant's pleading because this is not a case in which the appellant is in a position to contend that the alleged wrongdoers are in control of the subject company. It is therefore purely H an academic exercise to see whether the amending power ought to have been resorted to by the learned judge whose order is now under appeal. (emphasis added.)

[30] In the circumstances, I was of the view that the OS could be saved by way of an amendment to add both Choo Wee Thim and Liew Kee Hooi as I the third and fourth defendants in the OS respectively. The plaintiff has no objection to that amendment.

[31] This is an instance where I implored upon the parties particularly the defendants that the court should not be besotted by the rules of technicality and allow justice to be forsaken by alleged procedural irregularities in civil litigation. I was more concerned here with the interest and welfare of Choo Wee Thim and Liew Kee Hooi whose physical and mental health are fast deteriorating by the days. The paramount objective to me is to dispose both the civil suit and OS as expeditiously as possible because I do not wish to ultimately have embarked upon an academic exercise where both of them predecease the disposal of the civil suit and OS.

Conclusion

[32] It is for the foregoing reasons that I made the decision as so ordered. In *abundans cautela*, I ruled that leave is deemed given pursuant to O. 76 r. 1A of the Rules of Court 2012 by the addition of the third and fourth defendants though I thought that was strictly unnecessary in light of the nature and prayers sought in the OS. I have in this regard also appointed Dato' Haw Kim Then JP as the litigation representative of the third and fourth defendants pursuant O. 76 r. 6 of the Rules of Court 2012 upon the repeated requests of the first and second defendants notwithstanding that it is not clear from O. 76 of the Rules of Court 2012 that it was necessary in the circumstances. The plaintiff has also no objection thereto and I did not think this would harm or prejudice the parties in any way.